# Petition

No. 81-1429

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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

January Term, 1982

Rudolpho Longo,
Petitioner

v.

United States of America

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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ROBERT H. LORION
32037 Plymouth Rd.
Livonia, Michigan
48150
(313) 422-6070
(Counsel of Record)

Thomas A. Howard
966 CNB Building
Detroit, Michigan
48226
(313) 965-9050
(Of Counsel)

Attorneys for Petitioner

## QUESTIONS PRESENTED FOR REVIEW

1. Where the defendant is charged in three Counts of an indictment with conspiracy, and it is not clear whether the government is alleging the existence of one, two or three conspiracies, did the trial court err by failing to determine how many conspiracies were being alleged to exist before admitting for all purposes statements of co-conspirators alleged to have been members of only one of the conspiracies?

2. Where an indictment, by using the conjunctive where the statute on which the indictment is based uses the disjunctive, misleads the defendant with regard to the possibility

of acquittal and the severity of the possible sentence, does due process require the government to prove its case as the indictment, rather than the statute, reads?

## PARTIES TO THE PROCEEDING

William Stephenson, Katherine Marria, Wendy Courech, Timothy Greening, Robert Vuskon and Orville Waters were indicted as co-conspirators along with the defendant. They all plead guilty before trial.

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## REFERENCE TO REPORTS

The decision of the Sixth Circuit, the review of which the defense is requesting, has not yet been reported. Please see Appendix A for a copy.

The Sixth Circuit's denial of the defense's Petition for Rehearing and granting of the defense's Petition for Stay of Mandate have not yet been reported. Please see Appendixes B and C for copies.

The decisions of the trial court were not presented in written form. Please see Appendix D for copies of the pertinent pages from the trial transcript.

## STATEMENT OF JURISDICTION

On October 20, 1981, the Sixth Circuit Court of Appeals filed an Order affirming the decision of the trial court. It is this order which the petitioner seeks to have reviewed. On November 16, 1981, the Sixth Circuit Court denied the petitioner's Petition for a Rehearing which had been timely filed. The petitioner has filed this Petition for Writ of Certiorari within the 60 days from November 16, allowed by Supreme Court Rule 20.4. The jurisdicition of this Court is invoked under 28 U.S.C. §1254 (1).

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

> "...nor shall any state deprive any person of life, liberty, or property without due process of law..."

## STATUTORY PROVISIONS INVOLVED

21 U.S.C. §846:

> "Any person who attempts or conspires to commit any offense defined in this subchapter

is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

2. U.S.C. §841 (a)(1):

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

18 U.S.C. §1952 (a):

(a) Whoever travels in interstate or foreign commerce or uses any

facility in interstate or foreign commerce, including the mail, with intent to -

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT OF THE CASE

On September 2, 1978, a federal grand jury indicted the defendant,

Rudolpho Longo, along with alleged co-conspirators William Stephenson, Katherine Marria, Wendy Courech, Timothy Greening, Robert Vukson, and Orville Walters, all of whom eventually plead guilty. The grand jury issued a follow-up indictment on November 13, 1978. In Count One of the followup indictment Mr. Longo was charged with conspiring with the above-named persons, and other unknown persons, "to manufacture, to possess with intent to distribute, and to distribute various quantities of Phencyclidine" (PCP), contrary to 21 U.S.C. §841 (a)(1) and §846. Count Two alleged that Mr. Longo and Mr. Vukson travelled from Michigan to Illinois "with the intent to promote, manage, carry on and to

facilitate the promotion, management and carrying on of an unlawful activity...to wit, a business enterprise involving phencyclidine ...", contrary to U.S.C. §1952. Court Four alleged that Mr. Longo unlawfully possessed phencyclidine with intent to distribute, contrary to 21 U.S.C. §841 (a)(1). Count Six alleged that Mr. Longo and Mr. Walters travelled from Michigan to California "with the intent to promote, manage, carry on and to facilitate the promotion, management and carrying on of an unlawful activity...to wit, a business enterprise involving phencyclidine" (PCP), contrary to 18 U.S.C. §1952. Counts Two and Six, also alleged that

Mr. Longo and Mr. Vukson (Count Two) and Mr. Walters (Count Six) conspired to manufacture, possess and distribute phencyclidine, contrary to 21 U.S.C. §841 (a)(1) and §846. The indictment did not explicitely link these conspiracy counts with the conspiracy alleged in Count One. Nor was the link self-evident, considering the disparity in the number of co-conspirators alleged in Count One as compared to Counts Two and Six.

On May 29, 1980, Mr. Longo was convicted on all Counts after a jury trial before the Honorable Avern E. Cohn of the Eastern District of Michigan, Southern Division. On August 5, he was sentenced to five years

imprisonment on each Count, the sentences to run concurrently. On August 12, Judge Cohn set an appeal bond in the amount of $50,000 cash or surety. Mr. Longo posted the bond on August 15 and remains at liberty.

At the beginning of the trial Judge Cohn, in reliance on the goverment's offer of proof, conditionally admitted the statements of alleged co-conspirators against Mr. Longo. For example, Ms. Courech testified that Mr. Stephenson said "it had been presented to him by Rudy Longo to manufacture drugs for him and he would finish that." She also testified that Mr. Stephenson told her a camera had been set up to

study their residence from across the street, and that Mr. Longo had given him a synthesis of PCP.

At the close of the government's case, the trial court, over the defendant's objection, ruled that "the" conspiracy's existence, and Mr. Longo's involvement in it, had been proven by a preponderance of the evidence, and allowed the declarations of the alleged co-conspirators to remain in evidence. As noted above, it was never clear whether the government was alleging the existence of one, two or three conspiracies. The trial court apparently assumed the government alleged the existence of only one, and made its ruling on that basis.

Again, however, this was never clear.

Also at the close of the government's case, the defense moved for a Judgment of Acquittal. This Motion was denied.

On August 12, 1980, Mr. Longo filed a Notice of Appeal from his convictions. The defense argued on appeal that the trial court erred in admitting the statements of alleged co-conspirators against Mr. Longo, and, more specifically, that the trial court erred in failing to consider whether the government was alleging the existence of more than one conspiracy and, if so, making its ruling concerning the admissability of co-conspirator statements on that

basis. The defense also argued that the trial court erred in denying their Motion for Judgment of Acquittal. In connection with this argument the defense noted that various elements of the interstate travel Counts were stated in the conjunctive in the indictment, while the statute uses the disjunctive, and argued that under the circumstances of this case due process required the government to prove its case as it read in the indictment rather than the statute. The defense further argued that the government failed to meet this burden.

On October 20, 1981, the Sixth Circuit filed an Order which affirmed

the decision of the trial court, The defense followed with a timely Petition for Rehearing. The Sixth Circuit filed an Order on November 16 which denied this Petition. The defense then presented a timely Motion for Stay of Mandate Pending Application for Certiorari, which the Sixth Circuit granted on December 11, 1981.

REASONS FOR ALLOWING THE WRIT

As noted above, the trial court apparently assumed that the government was alleging the existence of only one conspiracy, and made its ruling on the admissibility of the statements of the alleged

co-conspirators on that basis. The defense contends that the trial court should have first determined how many conspiracies were alleged to have existed. If the existence of more than one was being alleged, the trial court should then have explained which conspiracy's existence, and Mr. Longo's and the declarant's participation therein, had been proven by a preponderance of the evidence, for these considerations would have affected the admissibility of the statements. For example, if the government had met its burden with regard to the conspiracies alleged in Counts Two and Six, but not with regard to the one alleged in Count One, then none

of the statements related by Wendy Courech, described in the above-statement of the case, would be admissible. Ms. Courech related the statements of William Stephenson, whom the government alleged was a member of the Count One conspiracy, but not of the Count Two and Six conspiracies. As participation by the declarant and the defendant in the same conspiracy is a prerequsite to admissibility, United States v Lyles, 593, F2d 182 (2d Cir. 1979), cert. den. 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed. 2d 789, Mr. Stephenson's statement would have been excluded.

On the other hand, the government may have met its burden with

regard to the conspiracy alleged in Count One, but not with regard to those alleged in Counts Two and Six. Under these circumstances the issue would have been the admissibility of statements made in the course of one conspiracy to prove the existence of another, in which the declarant had not participated. One Court of Appeals, before adopting a more non-committal position, indicated they favored not admitting statements made during a conspiracy not charged to prove a charged conspiracy, even if the declarant and defendant were both members of the uncharged conspiracy. United States v Cambindo Valencia, 602 Fed 603, 635-36, n. 25 (2nd Cir. 1979), and Order on

Petition for Rehearing, 609 F2d 641, cert. den. 446 U.S. 940, 100 S.Ct. 2163.

Considering the ways in which the evidence could have been excluded, fairness dictated that the trial court determine how many conspiracies the government was alleging to have existed. As the trial court did not do this, with the possible result being substantial prejudice to the defendant, and the Court of Appeals sanctioned this unfairness without even explicitely considering the defendant's contention, this Court should issue a writ of certiorari to consider what actions pursuant to its powers of

supervision it should take.

The second Question Presented For Review concerns the denial of defendant's Motion for Judgment of Acquittal. As noted in the above Statement of the Case, the interstate travel Counts (Two and Six) within the indictment used the conjunctive where the statute uses the disjunctive ("...with the intent to promote, manage, carry on and to facilitate the promotion, management and carrying on of an unlawful activity..." (emphasis added)). As there was no evidence that the defendant "managed" the illegal enterprise, the trial court must have considered the government's burden to be as described by the statute, rather than by the

indictment.

It is conceded that the trial court correctly interpreted the law as it stands in this regard. The defense contends, however, that this Court should issue a writ of certiorari to refine its holding in Turner v United States, 296 U.S. 398, 90 S.Ct. 642 ( ). In Turner, this Court held that the "general rule" is that "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive...the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Id. at 420.

An exception should be made under the facts of this case. The

interstate travel counts, when taken along with conspiracy charges, made it appear that Mr. Longo was the king pin of an unlawful activity. If the indictment had been written in the disjunctive, it would have alleged no more than the evidence, at the very most, indicated; that Mr. Longo was only one cog in the machinery. This difference could very well have influenced Mr. Longo's decision to go to trial rather than plead guilty. He could have believed the odds of defeating the government's case were greater than they were in actuality, given application of the Turner rule. He could also have gone to trial due to a fear of a greater sentence if he

was found guilty of, in effect, being the king pin.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ROBERT H. LORION
32037 Plymouth Road
Livonia, Michigan 48150

THOMAS A. HOWARD
(Of Counsel)
966 City National Bank Bldg.
Detroit, Michigan 48226

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>RUDOLPHO LONGO,<br><br>Defendant-Appellant | O R D E R |

Before: KEITH and BROWN, Circuit Judges; PHILLIPS Senior Circuit Judge.

Defendant Longo was indicted by a federal grand jury with co-conspirators William Stephenson, Katherine Marria, Wendy Courech, Timothy Greening, Robert Vukson and Orville Walters of one count of conspiracy to manufacture, process and distribute phencyclidine (PCP), a

controlled substance (21 U.S.C. §846), one count of possession with intent to distribute PCP, (21 U.S.C. §841 (a)(1)), and two counts of interstate travel in aid of raketeering, (18 U.S.C. §1952). Longo's co-conspirators all plead guilty, but he proceeded to a jury in the Eastern District of Michigan, where he was convicted on May 29, 1980 on all counts and sentenced to five years imprisonment on each count, with all sentences running concurrently.

Longo claims that the government failed to prove by a preponderance of evidence as required by United States v Enright, 579 F.2d 980 (6th Cir. 1978), that a

conspiracy existed, that he was a member of the conspiracy and that the statements of the co-conspirators were made in furtherence of the conspiracy. Accordingly, Longo claims that it was error to admit the statements at trial of his alleged co-conspirators under Federal Rule of Evidence 801 (d)(2).

The district judge admitted co-conspirator Courech's hearsay testimony subject to a determination at the close of the government's proof that there was a perponderance of evidence that Longo was a member of a conspiracy. The district judge was within his discretion by choosing this method of trial under the standards enumer-

ated in United States v Vinson, 606 F.2d 149 (6th Cir. 1979). At the close of the government's proof, the district judge determined that there was sufficient evidence to link Longo to the conspiracy to admit Courech's testimony as not being hearsay under Rule 801 (d)(2)(E) of the Federal Rules of Evidence.

Upon consideration and examination of the briefs and the record, this court concludes that there was sufficient evidence of Longo's participation in the conspiracy to meet the preponderance of the evidence standard set forth in Enright, supra, and Vinson, supra. Accordingly, we hold that the district court correctly decided that the

testimony was admissible.

Longo has also attacked the district court's denial of his motion for judgment of acquittal. Viewing the evidence in the light most favorable to the government, there was sufficient evidence presented for a jury to conclude beyond a reasonable doubt that Longo conspired to manufacture PCP, that he possessed PCP with and intent to distribute it, and that he engaged in interstate travel in furtherance of the conspiracy. United States v Prieur, 429 F.2d 1237, 1238 (6th Cir. 1970). The district court acted properly in denying defendant's motion.

It is therefore ORDERED that the

defendant's conviction be and the same is hereby affirmed.

ENTERED BY ORDER OF THIS COURT

:

JOHN P. HEHMAN, Clerk

Filed: October 20, 1981

NO. 80-5270

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>RUDOLPHO LONGO,<br><br>Defendant-Appellant. | O R D E R |

Before: KEITH and BROWN, Circuit Judges; PHILLIPS Senior Circuit Judge.

UPON CONSIDERATION, the petition for rehearing filed by appellant is hereby denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk

FILED: November 16, 1981

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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NO. 80-5270

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

RUDOLPHO LONGO,

Defendant-Appellant

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with

the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk

FILED: December 11, 1981

# APPENDIX D

The remaining pages form Appendix D. These pages are copies of the trial transcript at the point at which the trial court made the rulings pertinent to this Petition.

Are you keeping them on this floor?

MR. DAMREN: We keep them on the third floor in the DEA office.

THE COURT: I don't want any scurrying around for exhibits.

MR. DAMREN: I understand, your Honor.

THE COURT: You have to have a list. If the jury says, we want the exhibits, we know what is going in there and there isn't a lot of hassle.

Thank you.

MR. HOWARD: Fine, Your Honor.

THE COURT: Anything else?

MR. DAMREN: Does your Honor wish to reserve the Enright question as to the necessity of admission of co-conspirator statements and the standard that is applicable?

THE COURT: If there are any motions to be made now that are appropriate to be made at the conclusion of the Government's case, they should be made right now.

MR. DAMREN: I would move that the Court make that finding.

MR. HOWARD: I so move, your Honor, and I would like the record to reflect that at a side bar conference prior to this date both myself and the U.S. Attorney had a conversation with the Court wherein I reserved the right to raise the Enright question and I ask that that determination be made now. I should have done it, your Honor, before he rested.

THE COURT: Do you want the determination now?

MR. HOWARD: Tuesday morning.

THE COURT: If you have anything to say on the letters do it now.

Mr. Damren, do you have anything to say in support of your motion?

MR. DAMREN: Your Honor, simply, that I believe the admissions from Mr. Longo and the physical exhibits and the surveillance photographs and the items I have enumerated in my trial brief have occurred in this case and provided a foundation independent of co-conspirator statements to support the Court's finding by the preponderance of the evidence by Enright that Mr. Longo was a member of the conspiracy and the conspiracy existed, hence

making the co-conspirator statements that have been adduced in evidence appropriate and proper.

I would ask the Court on those bases to so find. If the Court requests it, I would go through the evidence in more detail, if the Court wants.

THE COURT: You may want to do that in reply to whatever Mr. Howard says.

MR. HOWARD: I will be very brief, your Honor.

I would submit that there is not a preponderance of evidence that would be a sufficient basis for admitting the testimony of the co-conspirators as against my client. There are no admissions

unless counsel is going to argue that the statements made by other witnesses regarding conversations involving Rudy Longo -- I don't believe we even have those -- we don't have them to a limited degree -- would be a sufficient basis. I say that there is not a preponderance of the evidence, your Honor, for the admission of the statements of the co-conspirators as against my client as per Enright and later cases.

THE COURT: Mr. Damren.

MR. DAMREN: Your Honor, simply, the admissions the Government is referring to are statements he made in the presence of Miss Courech and statements he made to

Miss Ballas. In addition to that are all the surveillance information that is included from Michigan, Ohio, Illinois, and in connection with California and further the physical exhibits that were introduced, your Honor, that have Mr. Longo's name on them and so on and so forth. I believe that's the basis for it.

THE COURT: The Court is satisfied that there is sufficient evidence in the record to link Mr. Mongo to the conspiracy under the tests established by Enright statements. The evidence just recited by the United States Attorney is the evidence that the Court refers to, the statements of the witnesses

Courech and Ballas and the surveillance, photographs, observations of Mr. Longo's physical activity.

MR. HOWARD: Thank you, your Honor.

THE COURT: Any other motions?

MR. HOWARD: Yes, your Honor, I would like to make a motion for dismissal bas ed -- judgment of acquittal based on the fact that the prosecution has not borne the burden of proof that involves upon at this time. I would not argue the facts inasmuch as the Court has heard the facts.

THE COURT: Mr. Damren.

MR. DAMREN: I have no response, your Honor.

THE COURT: Under the test, I

think it's United States v Curry, if I recall -- it's an old case -- on a Rule 29 motion, if the jury from the evidence could reasonably find beyond a reasonable doubt that the defendant is guilty, or reasonably find beyond a reasonable doubt that the defendant was not guilty, the Court is required to deny the motion. If I have not expressed the test correctly or cited the case correctly, I reserve the right to do so. If you come back to me Tuesday morning, Mr. Howard, I believe the case is United States v Curry, and under that test the motion, under Rule 29 for a judgment of acquittal at the conclusion of the Government's case will be denied.

MR. HOWARD: Thank you, your Honor.

THE COURT: Anything else?

MR. DAMREN: I have nothing further, your Honor.

THE COURT: We are in recess until Tuesday morning.

One other thing, Gentlemen.

I have here a rough draft of the jury instructions, cut and pasted from instructions that the Court has used in the past and from what the Government offered. You are both intelligent enough to follow my tracks, but at least it will offer you some assistance.

I call your attention very particularly, Mr. Damren, that the boiler plate on conspiracy and

travel act, where there are multiple defendants charged in the indictment, but only a single defendant on trial, may require some further editing because in the boiler plate